IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.RAMKUMAR

TUESDAY, THE 18TH SEPTEMBER 2007 / 27TH BHADRA 1929

Crl.Rev.Pet.No. 2488 of 2007()

CRA.91/2006 of ADDL. SESSIONS COURTS (ADHOC), MAVELIKKARA
CC.97/2005 of JUDL.MAGISTRATE OF FIRST CLASS, KAYAMKULAM

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REVN. PETITIONER: REVISION PETITIONER/APPELLANT/ACCUSED

SATHEESH KUMAR, AGED 40 YEARS,
S/O.DIVAKARAN, GURUKRIPA, KAILUMMOODU,
KAYAMKULAM.

BY ADV. SRI.B.RENJITHKUMAR

RESPONDENTS: COMPLAINANT

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1. STATE OF KERALA, REPRESENTED BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

2. VIJAYAN, AGED 44 YEARS,
KOYIKKALETHU, KADUVINAL MURI,
VALLIKUNNAM.

BY PUBLIC PROSECUTOR SRI.K.S. SIVAKUMAR
SRI.P.SREEKUMAR
SRI.K.S.MANU (PUNUKKONNOOR)

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 18/09/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

V.RAMKUMAR, J.

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Crl.R.P. No. 2488 of 2007

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Dated: 20-11-2007

O R D E R

In this Revision filed under Section 397 read with Sec. 401 Cr.P.C. the petitioner who was the accused in C.C. No.97 of 2005 on the file of the J.F.C.M. Kayamkulam challenges the conviction entered and the sentence passed against him for an offence punishable under Sec. 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as 'the Act').

2. Heard both sides.

3. The learned counsel appearing for the revision petitioner contended that Exts.P4 to P6 have no inter relationship to each other and they do not evidence the issuance or the receipt of the statutory notice under Sec. 138 of the N.I. Act. They are mere photocopies and the unclaimed cover in which the notice was allegedly sent has not been produced along with the complaint. According to the learned counsel, without laying the foundation for receipt of secondary evidence, such documents should not have been permitted to be marked in evidence and Exts.P4 to P6 cannot be looked into to hold

that the cause of action for launching the prosecution has been proved. He also argued that in the absence of an order by the Magistrate dispensing with the attendance of the complainant, the complainant ought to have been present the court and should have offered himself for cross-examination. The complaint was filed by the complainant himself and the sworn statement was given by the complainant and it was during the course of the trial, that is, on 17-10-2005 that the power - of - attorney entered appearance consequent on a petition filed by the complainant. Hence, according to the learned counsel for the revision petitioner the prosecution under Sec. 138 of the N.I. Act are unsustainable.

4. I am afraid that I cannot agree with the above submissions. Exts.P4 to P6, no doubt, are photocopies of the statutory notice dated 30-12-2004, the postal receipt and the letter sent by the complainant's counsel to the accused in his address at Guru Kripa, Factory Junction, Kayamkulam. But all these documents were marked without demur. During his examination under Sec. 313 Cr.P.C. pointed questions were put to him that Ext.P2 cheque was issued by him for the sum of Rs. 1,50,000/- borrowed by him from the complainant. He had no answer. Again he was asked as to what he had to say with regard to the evidence of the complainant examined as P,.W.1 that Ext. P2 cheque when presented before bank was dishonoured for the reason that there was no sufficient funds in his account. To this question also he remained silent without giving any answer. The next question put to

him was that the evidence of P.W.1 would go to show that Exts.P4 to P6 are documents to indicate the dishonour of the cheque and the issuance of notice. Again he had no answer. He was further confronted by the trial court with the question that the evidence of P.W.1 indicated that notice of dishonour was issued to him and he did not pay the amount. To that question also he had no answer. Finally he was asked as to whether he had anything else to state before Court. His only answer was that he has repaid the entire money to the complainant. He had no case before the Court that the original transaction was a chitty transaction or that he happened to give a signed blank cheque to the complainant and the same was dishonestly converted into Ext.P2 cheque. It was in the face of this evidence that the courts below unhesitatingly rejected his defence and convicted him of the offence punishable under Sec. 138 of the N.I.Act. In the light of a recent decision of the Apex Court reported in **2004 (7) SCC 107** that where secondary evidence is adduced by a party without laying the foundation for the same, objection must be taken at the time of admission and not at a later stage, the present contention is clearly unsustainable. All that apart, as indicated earlier, the revision petitioner had no such defence when he was examined under Sec. 313 (1)(b) Cr.P.C. He had no explanation either as to how the cheque leaf issued by the drawee bank with regard to an account maintained by him happened to be in the custody of the de facto complainant. Such being the position, I see no reason to interfere with the conviction

entered by the courts below concurrently and the same is accordingly confirmed.

5. What now survives for consideration is the question regarding the adequacy or otherwise of the sentence imposed by the courts below. [In the normal course, the revision petitioner having persistently untenable contentions before this Court, I would not have hesitated to confirm the sentence imposed by the trial Court which is simple imprisonment for one year and compensation by way of the cheque amount. But the indiscretion or cantankerous attitude of the revision petitioner or his counsel cannot be a reason for the court to be vindictive. Hence,]. The sentence imposed on the revision petitioner is altered to imprisonment till rising of the court provided he pays the cheque amount of Rs. 1,50,000/- (Rupees one lakh fifty thousand only) to the complainant within three months from today failing which he shall suffer simple imprisonment for three months by way of default sentence.

Recording the conviction entered and modifying the sentence, this Revision is disposed of .

V.Ramkumar, Judge.

"[.....] the marked portion is deleted as per order dated 20-11-2007 in Crl.M.A. No. 12112 of 2007 in Crl.R.P. No. 2488 of 2207".

V.Ramkumar, Judge.

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V.RAMKUMAR, J.

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Crl.M.A. No. 12112 of 2007
in
Crl.R.P. No. 2488 of 2007

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Dated: 20-11-2007

O R D E R

After hearing the learned counsel for the petitioner the

following portion in the order dated 18-09-2007 in Crl. R.P. No. 2488 of 2007 is hereby deleted.

> "In the normal course, the revision petitioner having persistently untenable contentions before this Court, I would not have hesitated to confirm the sentence imposed by the trial Court which is simple imprisonment for one year and compensation by way of the cheque amount. But the indiscretion or cantankerous attitude of the revision petitioner or his counsel cannot be a reason for the court to be vindictive. Hence,"

V. Ramkumar, Judge.

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